

October 11, 2012

David J. Erwin
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Re: Your Request for Advice
Our File No. A-12-141

Dear Mr. Erwin:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Please note, our advice is limited solely to the provisions of the Act. We offer no advice on the applicability, if any, of other state or local laws, including Government Code Section 1090.

QUESTION

Do the members of the City Council have a conflict of interest in voting on several alternative benefits packages that will change their current benefits?

CONCLUSION

Because the Council’s decision applies to an entire class of employees and is not tailored to specific employees in that class, Regulation 18705.5 permits the Council members to participate in the decision. Thus, there is no conflict-of-interest as defined by the Act.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

Currently, the City of Palm Desert has in place a health, life insurance, long-term disability, and medical plan for all employees, including members of the City Council. A Citizen's Committee formed to review the plans has recommended that the health and medical benefits be capped at \$7,500 per member of the City Council. In addition to the Citizen's Committee recommendation, staff has proposed an alternative that would reduce the current benefits in small ways, but would, for the most part, keep all of the benefits available to the members of Council in place. The changes in benefits would only impact the City Council members and not any other City employee.

In your request for advice you also raised questions regarding Government Code Section 1090 and the effect Government Code Section 53208 would have with regard to Section 1090 and the alternative benefits packages suggested by the Citizen's Committee. As discussed in my e-mail dated October 5, 2012, our advice is limited to obligations arising under the Act, and we do not address the applicability of Government Code Section 1090. If you require an analysis on the applicability of Government Code Section 1090 we recommend that you contact your city attorney.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. The Commission has adopted an eight-step analysis for determining whether an official has a disqualifying conflict of interest. (Regulation 18700(b).)

Steps 1 and 2: Are the individuals in question public officials who will be making, participating in making, or influencing a governmental decision?

The Act's conflict-of-interest provisions only apply to public officials. (Sections 87100, 87103; Regulation 18700(b)(1).) Section 82048 of the Act defines a public official as "every member, officer, employee or consultant of a state or local government agency." As members of the City Council, the individuals in question are public officials. Consequently, they may not make, participate in making, or otherwise use their official position to influence any governmental decision that will have a reasonably foreseeable material financial effect on any economic interest they may have.

A public official "makes" a governmental decision when the official, acting within the authority of his or her position, votes on matter, commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.2.) A public official "participates in making" a governmental decision when the official,

acting within the authority of his or position, advises or makes recommendations to the decision-maker either directly or without significant intervening substantive review, by preparing or presenting any report, analysis, or opinion, orally, or in writing, that requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision. (Regulation 18702.2.)

Public officials are also prohibited from “influencing” a governmental decision. There are two separate rules to determine whether a public official uses or attempts to use his or her official position to influence a governmental decision:

1. When the governmental decision is within or before the public official’s own agency or any agency appointed by or subject to the budgetary control of the public official’s agency, but the public official is not the decision-maker per se, the official is considered to be attempting to “influence a governmental decision” if the official “contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency.” (Regulation 18702.3(a).)
2. When the governmental decision is within or before an agency other than the public official’s own agency, or an agency appointed by or subject to the budgetary control of the public official’s agency, the official may not act or purport “to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency” to influence a decision. (Regulation 18702.3(b).)

Step 3: What are the official’s economic interests?

The Act’s conflict-of-interest provisions apply only to conflicts of interests arising from an official’s economic interests, as described in Regulations 18703 – 18703.5. A public official has an economic interest in:

1. A business entity in which the public official has a direct or indirect investment worth \$2,000 or more (Regulation 18703.1(a)), or in which he or she is a director, officer, partner, trustee, employee or holds any position of management. (Regulation 18703.1(b).)
2. Real property in which the public official has a direct or indirect investment worth \$2,000 or more in fair market value. (Regulation 18703.2(a).)
3. Any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Regulation 18703.3.)
4. Any source of gifts to him or her if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Regulation 18703.4.)

5. His or her personal finances, including those of his or her immediate family (the “personal financial effects” rule). (Regulation 18703.5.)

Because a City Council is a government agency under Section 82041, the salary and benefits paid by the government to Council members is not considered “income” under Section 82030(b)(2), the “government salary exception” of the Act’s definition of “income.” The “government salary exception” excludes from consideration:

“Salary and reimbursement for expenses or per diem, and social security, disability, or other similar benefit payments received from a state, local, or federal government agency and reimbursement for travel expenses and per diem received from a bona fide nonprofit entity exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.”

However, a personal financial effect on government salary and benefits may still be disqualifying as an effect on personal finances. Because this is the only economic interest that may be affected by the governmental decision, our analysis continues with respect to the personal financial effects of the decision, as discussed below.

Step 4: Are the economic interests directly or indirectly involved in the decision?

In order to determine if a governmental decision’s reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the officials’ economic interest is directly or indirectly involved in the governmental decision. (Regulation 18704(a).)

Under Regulation 18704.5 a public official is deemed to be directly involved in decisions that have *any* financial effect on the official’s personal finances. (Regulation 18704.5.) A decision regarding an alternative benefits package would have a financial effect on the personal finances of the officials covered by those benefits. Therefore, the officials’ economic interest in their respective personal finances would be *directly* involved in the decision.

Step 5: Will there be a material financial effect on the economic interests?

Once the degree of involvement is determined, Regulation 18705 the conflict of interest analysis addresses the applicable materiality standards. For a personal financial effect, Regulation 18705.5(a) provides:

“(a) A reasonably foreseeable financial effect on a public official’s or his or her immediate family’s personal finances is material if it is at least \$250 in any 12 month period . . .”

However, Regulation 18705.5(b) provides an exception for decisions that affect only the salary, per diem, or reimbursement for expenses of the public official. It states:

“(b) The financial effects of a decision which affects only the salary, per diem, or reimbursement for expenses the public official or a member of his or her immediate family receives, from a federal, state, or local government agency shall not be deemed material, unless the decision is to . . . set a salary for the official or a member of his or her immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position . . .”

Applying this rule to your question, because Regulation 18705.5(b) takes into account the “government salary exception” set forth in Section 82030(b)(2), an official may participate in a decision even when there is a financial effect is on the official’s own government salary or benefits if the salary or benefits in question are for all of government agency employees who are in the same job classification or position.

The benefits package addressed here meets that standard. It will apply equally to all City Council members. Accordingly, we conclude that the exception provided in Regulation 18705.5(b) applies. Therefore, the officials may participate in decisions concerning the alternative benefits packages.

Given this exception, the officials do not have an economic interest in the governmental decision, and our analysis ends at Step 5.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Harjeet E. Gidha
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HEG:jgl